IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1341 of 2004
with
CRIMINAL MISC.APPLICATION No 7840 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHIRAG DHIRAJLAL ALIAS DHIRUBHAI BRAHAMBHATT
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1341 of 2004
MR PM THAKKAR with MR YV BRAHMBHATT for Appellant
MS HARSHA DEVANI, APP for Respondent No. 1
2. Criminal Misc.Application No. 7840 of 2004
MR PM THAKKAR with MR YV BRAHMBHATT for Applicant
MS HARSHA DEVANI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 22/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

While hearing the application filed by the appellant under Section 389 of Cr.P.C., prima facie it appears to us that the conviction recorded by the trial Court for the offence under Section 302 of IPC is erroneous. Since the copies of the evidence have already supplied by the appellant, with the consent of learned Advocate for both the sides, we have taken up this matter for final disposal.

It may be stated at the outset that learned Senior Advocate Mr.Thakkar appearing with Mr.Y.V.Brahmbhatt, learned Advocate for the appellant has fairly conceded that so far the involvement of the appellant in the incident and the authorship of the injuries caused to the deceased is concerned, he does not have any case and the appeal may be decided on the questions of the nature of the offence committed by the appellant and the quantum of sentence.

On going through the judgment and the evidence and after hearing learned Advocates, it appears that the incident in question took place on 17th Nov. 1996 in the evening at 6.30. According to the prosecution, at that time, the son of the complainant, namely, Devendra Patel had gone to the place of Jitubhai for receiving phone call and thereafter when he came out on the road, he saw the appellant going towards his house carrying ironed clothes with him. The deceased at that time asked the appellant why he was abusing the appellant. Thereafter some scuffle ensued between them and during the scuffle, the appellant took out the knife from the pocket of his pant and inflicted one blow on the left hand side of the stomach of the deceased. The complainant, namely, Prabhaben, mother of the deceased tried to intervene and in that process, she also sustained injury on the elbow of left hand. In the meanwhile, on hearing the shouts, Induben Laljibhai, Chintan Mukeshkumar and others gathered there. Since deceased Devendra Patel was lying in a bleeding condition, he was shifted to the hospital. At the hospital, the police arrived and the complaint was lodged by the mother of the deceased. On the strength of the said complaint, the offence was registered at Surendranagar Police Station being I-C.R. No. 276 of 1996 and the investigation was commenced. Initially the offence under Section 307 of IPC was registered. The panchnama of the scene of offence was drawn; statements of various witnesses were recorded and the appellant was

arrested. On completion of the investigation, the chargesheet with regard to the offence under Sections 307, 324 and 504 of IPC was filed against the appellant in the Court of learned Chief Judicial Magistrate, at Surendranagar. On 8th March 1997, the Investigating Officer submitted an application to the learned Magistrate for adding the charge under Section 302 of IPC since injured Devendra Patel expired while he was taking treatment in the Civil Hospital, Ahmedabad on 2nd March 1997. The said offence was duly added. Since the offence under Section 302 of IPC was being exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of learned Sessions Judge, Surendranagar for trial which was numbered as Sessions Case No. 47 of 1997.

At the trial, the charge was framed at Exh.13. The appellant pleaded not guilty and claimed to be tried. The prosecution, in support of its case, examined 17 witnesses and also produced documentary evidence in the form of FIR, post mortem notes, various panchnamas etc. On completion of the recording of the evidence, further statement of the appellant under Section 313 of the Cr.P.C. was recorded wherein he was put all the circumstances appearing against him in the evidence to enable him to offer explanation, if any. Ultimately, the learned Addl. Sessions Judge, Surendranagar, convicted the appellant for the offence under Section 302, 325 and 504 of IPC by order dated 27th July 2004. After hearing on the question of sentence, he was ordered to suffer RI for life and to pay a fine of Rs.1,000/- for the offence under Section 302 of IPC; RI for two years and to pay a fine of Rs.500/-, in default to undergo RI one month for the offence under Section 324 of IPC; and lastly, RI for six months and to pay a fine of Rs.200/- in default to undergo SI for 15 days for the offence under Section 504 of IPC. All these sentences were ordered to run concurrently.

It is the above judgment and order of conviction and sentence which is under challenge in this appeal.

As stated above, learned Senior Advocate appearing for the appellant has not challenged the involvement of the appellant in the incident and the fact regarding his inflicting blow on the deceased. He argued the matter only on the question of the nature of offence and the quantum of sentence.

According to Mr.Thakkar, considering the facts and circumstances of the case and in particular the

medical evidence, the offence would not fall under Section 302 of IPC and the conviction recorded under that Section by the trial Court was erroneous. He has further submitted that at best, the appellant can be attributed with the knowledge of the act which he has committed and it would bring his case under Section 304 Part II of IPC. As against that, Ms.Harsha Devani, learned APP has supported the judgment of the trial Court. She has further submitted that looking to the nature of the injuries and the damage caused to the vital part of the body, the intention of the appellant was clear and the conviction recorded by the trial Court for the offence under Section 302 of IPC is just and proper.

We have carefully gone through the oral as well as medical evidence on record. Since involvement of the appellant in the incident was not challenged, we do not propose to deal with details of the oral evidence. We may, however, discuss the medical evidence in detail. It may be noted here that no post mortem has been performed and there is no evidence available in the form post mortem notes. Whatever the medical evidence that is available is in the form of medical certificates of the deceased and the oral evidence of Dr.Shailesh Jayanand Bhatt, PW-11 Exh.36; Dr.Ashokbhai Gigabhai Jildiya, PW-14 Exh.47; and Dr.Mahendra Shantilal Bhavsar, PW-15 Exh.50.

Dr.Shailesh Jayanand Bhatt, PW-11 Exh.36 has deposed that while he was discharging duty at M.G. Government Hospital, at Surendranagar on 17th Dec.1996, at about 7.45 p.m., the relatives of Devendra Patel had brought him for the treatment without Police Yadi. On making enquiry, he was informed that somebody had assaulted him with knife on the stomach where his house is situated. According to this witness, at that time, the injured was in conscious condition and his temperature was normal. He had, after the examination, found that he had one injury on the left side of the stomach. It was a punctured wound and it was 1-1/2" in length and 1/2" in width and abdominal cavity deep. It was a bleeding injury. From the wound, some part of internal organ was protuding. Thereafter the full time Surgeon Dr.Ashokbhai Gigabhai Jildiya had examined him at about 10.00 p.m. who performed the abdominal operation. In the meanwhile, Mr.S.N.Solanki, PSO of Surendranagar City Police Station was informed about the incident and he was also asked to make arrangement for recording the dying declaration. This witness has produced the medical case papers of Devendra Patel which are exhibited at Exh.37. He has stated that during the course of the operation, certain internal injuries were found to have

been caused to the veins; there were holes also in the left intestine and to the veins supplying blood to it. It was also found that the veins supplying blood to Kidneys was injured. The left Pancreas was also damaged. He has further stated that the Spleen as well as the left Kidney and part of the larger intestine were removed. The operation was performed by him with the assistance of Dr.G.C.Patel. Devendra Patel was thereafter shifted to Civil Hospital, Ahmedabad on 22nd Jan.1997 at about 1.00 p.m. At that time, his condition was serious. The injuries were of serious nature. He has further stated that the internal injuries Nos.1 and 3 were sufficient to cause death if the medical treatment was not secured immediately. From the cross examination of this witness, it appears that the patient was intermittently allowed to leave the hospital. He has, however, denied the suggestion of the defence that the patient was likely to have infection while he was out of the hospital.

The second witness is Dr.Ashokbhai Gigabhai Jildiya, PW-14 Exh.47 who has performed the operation. He has stated in his evidence that on 17th Dec.1996, he was working as full time Surgeon in the M.G.Govt. Hospital. On that day at about 9.00-10.00 O'clock in the night, the operation of Devendra Patel was performed. He has also described the injuries which tally with the evidence of Dr.Shailesh Jayanand Bhatt. He has stated that for 24 hours, the condition of the patient would be considered as serious and thereafter for a period of eight to ten days if there was complication, the condition could be termed as serious. He has further stated that between 10th Jan.1997 and 22nd Jan.1997 for about 12 days, Devendra Patel was permitted to go home and he used to visit the hospital for dressing as an indoor patient twice a day in the morning and in the evening. He has further stated that even on 22nd Jan.1997, the patient was not completely out of danger, but there was no possibility of immediate death resulting from such injury. He was thereafter referred to Gastro-Enterologist at the Civil Hospital, Ahmedabad, for his opinion. He has stated that the injury caused is by sharp cutting instrument. In the cross examination, he has stated that if the patient had lost about one litre of blood more, there was possibility of his death would have increased. He has also stated that when the patient was sent home, his condition was not very satisfactory and he was not completely out of danger.

Lastly, Dr.Mahendra Shantilal Bhavsar, PW-15, who had treated the deceased at the Civil Hospital at Ahmedabad is examined at Exh.50. He has stated that, he,

at the relevant time, was rendering honorary service in the Gastro-Enterology Department of the Hospital. He had examined Devendra Patel, i.e. deceased, on 2nd March 1997. Devendra Patel was admitted in the Hospital on 15th Feb.1997 and the treatment was continued till 2nd March 1997 and he expired at about 10.00 p.m. on 2nd March 1997. This witness has stated that whatever stated was on the strength of the medical case papers. He, however, opined that on examination of the patient, in his opinion, he had died of Septicemia, shock and multiple organ failure. He has further stated that because of the removal of Spleen, there is decreased immunity and there was increased possibility of Septicemia because the body is unable to discard filth. In the cross examination, this witness has stated that no post mortem performed. He has also admitted that without post mortem, it is difficult to determine the cause of death.

Considering the aforesaid oral evidence of the Doctors who treated the deceased and also the medical case papers, it appears that there was a single blow on the stomach. It further appears from the record of the case that in the morning, some altercation had taken place between the two, which, as stated above, again revived in the evening when the deceased who came out of the house of Jitubhai, saw the appellant going towards his house and asked why he was abusing. It also appears from the record that there was a scuffle between the two and it was at that point of time, the blow was inflicted with knife. In this factual background, it is easy to conclude that there was no pre-meditation. The incident took place all of a sudden. The appellant has not taken any undue advantage of the unarmed position of the deceased. Further, the medical evidence shows that because of the immediate medical treatment, he was survived for a period of 72 days. It is stated by the Doctors that if he had not received the medical aid, he would have expired. Thus, the injury was not of such a nature which could have caused death of the patient in the ordinary course of nature. When there is no pre-meditation and only a single blow is inflicted on the stomach and that too, when it has resulted into the injury which is not sufficient in the ordinary course of nature, it can well be said that the appellant had no intention to cause any fatal injury to the deceased. At best, he can be attributed with the knowledge that such injury might have resulted into death of the person to whom it is caused. When there is no intention but the knowledge, naturally, it would not fall within the purview of Section 302 of IPC, but it would be culpable

homicide within the meaning of Section 304 Part II of IPC. If that be so, the conclusion drawn by the trial Court with regard to the guilt of the appellant under Section 302 of IPC is erroneous.

In the result, the appeal is partly allowed. The judgment and order of conviction and sentence passed by the learned Addl.Sessions Judge, Surendranagar is modified to the extent that the sentence imposed by the appellant for the offence under Section 302 of IPC for life imprisonment is converted into one for a term of RI for five years for the offence under Section 304 Part II. We are also of the opinion that since the complainant has lost her son, she is required to be given a token compensation. For that purpose, we increase the amount of fine to Rs.15,000/- (Rupees Fifteen thousand only) from Rs.1,000/-, in default to undergo RI for one year, for the offence under Section 304 Part II. We, however, maintain the conviction and sentence imposed by the trial Court for other offences. It is also made clear that if the fine as imposed by the trial Court is already paid, the appellant is now required to pay the additional amount of Rs.14,000/(Rupees Fourteen thousand only). It is also directed that the trial Court may, after due verification, pay Rs.14,000/-, if paid by the appellant, to the complainant namely, Prabhaben Hiralal Patel.

In view of the order passed in the main appeal, no orders are required to be passed in the application for bail. Accordingly, Criminal Misc.Application No. 7840 of 2004 stands disposed of. Notice is discharged.

(Kshitij R.Vyas, J.)

(Akshay H.Mehta, J.)
Sreeram.